

Cal Western Transport, Inc. and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 386, International Brotherhood of Teamsters, AFL-CIO, CLC. Cases 32-CA-13163 and 32-CA-13228

January 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

On January 31, 1994, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions, a supporting brief, and a motion to strike.¹ The Respondent filed exceptions, a supporting brief, a reply to the General Counsel's exceptions, and a reply to the General Counsel's motion to strike.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.

The General Counsel excepts to the judge's finding that the Respondent did not violate Section 8(a)(3) when it discharged employee Morrison. We find merit in this exception for the reasons stated below.

The Respondent transports milk from individual dairies to various dairy product manufacturers. Charles Morrison worked for the Respondent as a truckdriver. Morrison contacted the Union in March 1993 and arranged a union meeting. Thereafter, Morrison spoke to other drivers about the Union, passed out union literature, and posted a union pamphlet on the Respondent's bulletin board.

On March 27, Allen Perryman, the Respondent's chief dispatcher, asked to talk to Morrison. According to Morrison, Perryman asked, "What's all this Union shit I'm hearing about?" Perryman stated that he was hearing all kinds of rumors about the Union and these

rumors were pointing to Morrison. Morrison replied that he didn't think that he should talk to Perryman about the Union. Thereafter, Perryman stated that he didn't care whether the drivers went Union or not because he (Perryman) would have his job anyway. Perryman also asked Morrison who else was involved with the Union and where the union meetings were taking place. The judge found, and we agree, that Perryman's remarks constituted unlawful threats and interrogation.

On the day after Perryman's threats and interrogation of Morrison, the Respondent discriminatorily discharged employee Hayes for engaging in union activity. Furthermore, only 1 week later, the Respondent discriminatorily discharged employee Duran.

On June 30, Morrison was assigned to drive a truck usually driven by George Bowles. Morrison began to remove a large box containing Bowles' tools and materials. Bowles told Morrison to "leave the fucking box in the truck or I'm going to kick your ass." Morrison replied that if Bowles didn't want his "shit messed with," he should take it home like everybody else. Bowles, a large man, then grabbed Morrison's shirt and hit him in the face. Morrison was thrown backwards by the punch, his glasses were knocked off, and everything he was carrying was scattered on the ground. Morrison was spitting blood and the entire front of his shirt was ripped off.

Morrison credibly testified that he wanted to avoid getting into a fight because he thought that the Respondent would seize on any such incident as grounds to discharge him in retaliation for his union activity. Thus, after Bowles struck him, Morrison hollered for Perryman to come out of the office. Perryman came out and asked what happened. Morrison replied that Bowles had just hit him and that he wanted him arrested. Perryman replied that no one was going to be arrested.

Perryman separated the two drivers and said that he had to make a phone call. Thereafter, Perryman came out of his office and said that he would call the sheriff if Morrison still wanted him to do so. Morrison had calmed down and stated he was no longer interested in having Bowles arrested. Bowles, who was standing nearby, replied that the real reason Morrison didn't want the sheriff called was because of Morrison's possession of a knife which had fallen out of his tool caddy. The knife was a hunting knife, with a 5-inch blade, in a leather sheath. Bowles stated that he would have Morrison arrested for carrying a concealed weapon. Morrison replied that he wasn't carrying a concealed weapon because the knife was being carried in an open tool caddy, and "besides that I have a right to defend myself; I should have come up with it and cut your fucking throat." Perryman replied that Morrison would not be cutting anyone in his terminal.

¹ We deny the General Counsel's motion to strike and request that the Respondent's counsel be admonished.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We find it unnecessary to pass on the issue of whether the Respondent, through Regional Manager Avila, made an unlawful threat of plant closure on April 9, 1993. Even if Avila made such a threat, the violation would not affect the remedy, given the other unlawful threats to close that we have found.

Perryman further stated, "I'll take that thing away from you and shove it right up your ass too." Morrison replied that if Perryman tried to take the knife away from him and shove it up his "ass," then Morrison would cut Perryman's "ass" too.

In a July 7 letter, Respondent discharged Morrison, allegedly because of the incident described above.

Based on the Respondent's unlawful threats and interrogation of Morrison and on the discriminatory discharges of two other employees, we find, in agreement with the judge, that the General Counsel established a prima facie case that a reason for Morrison's discharge was his union activity. Further, we are not persuaded that Respondent has established that the discharge would have occurred in the absence of union activity.⁴ In this regard, Respondent relies on Morrison's threats and his possession of the knife. However, the entire incident was precipitated by Bowles' threat to, and assault on, Morrison.⁵ Morrison credibly testified that he sought to avoid a fight.

The knife was displayed only because it fell from a tool caddy as a consequence of Bowles' assault.⁶ There is no evidence that mere possession of a knife is a ground for discharge. Morrison did not brandish the knife or remove it from its sheath. Although Morrison uttered threats concerning the use of the knife, he did so only in response to Bowles' assault and to Perryman's own threat to Morrison.

The Respondent has not shown that it has a policy or practice of discharging employees in comparable circumstances. Although we do not condone Morrison's conduct, we find that the Respondent has not met its burden of establishing that Morrison would have been discharged for such conduct in the absence of his union activity.⁷ Accordingly, we conclude that his discharge also violated Section 8(a)(3) of the Act.

AMENDED CONCLUSION OF LAW

Substitute the following for paragraph 4 of the judge's Conclusions of Law.

"4. The Respondent has violated Section 8(a)(3) and (1) of the Act by discharging employees Ted Duran, Frank Hayes, and Charles Morrison because of their interest in and activities on behalf of the Union."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

⁴See *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), aff'd. in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

⁵Bowles was suspended for 14 days; Morrison was discharged.

⁶Knives were used at work in connection with the cutting of tubing.

⁷Although the Respondent had previously disciplined Morrison for insubordination, Respondent admittedly discharged him "based solely upon" the incident with the knife.

modified below and orders the Respondent, Cal Western Transport, Inc., Modesto and Los Banos, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Make employees Frank Hayes, Ted Duran, and Charles Morrison whole for any loss of pay or benefits suffered by reason of the discrimination against them, in the manner described above in the remedy section of the decision."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees regarding their own union activities or the union activities of other employees by asking who is involved with the Union, where union meetings are being held, or any other questions about employees' involvement with the Union.

WE WILL NOT threaten employees with loss of jobs, discharge, reduced income, or the closing down of the business in the event they select the Union as their collective-bargaining representative and the possibility of violence by antiunion employees.

WE WILL NOT discharge employees because they have engaged in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer employees Frank Hayes, Ted Duran, and Charles Morrison immediate and full reinstatement to their former positions, without loss of seniority or other benefits, and we will make them whole, with interest, for any loss of pay or benefits suffered by reason of our discrimination against them, and we will

expunge from their personnel files any reference to their discharges.

CAL WESTERN TRANSPORT, INC.

Barbara D. Davison, Esq., for the General Counsel.
Harry Finkle, Esq. (Finkle & Barsamian), of Fresno, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Modesto, California, on October 5, 6, and 7, 1993. The charges were filed on May 4 and June 3, 1993, respectively, by Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 386, International Brotherhood of Teamsters, AFL-CIO, CLC (the Union). The charges were amended by the Union on May 7 and July 21, 1993, respectively. On June 25, 1993, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing in Case 32-CA-13163, and on July 30, 1993, the Regional Director issued a consolidated complaint and notice of hearing in both captioned cases, alleging violations by Cal Western Transport, Inc. (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The complaint was amended at the hearing. In its duly filed answer to the consolidated complaint, the Respondent denies that it has committed the unfair labor practices as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation with offices and places of business located in Modesto and Los Banos, California, where it is engaged in the transportation by truck of milk and juices. In the course and conduct of its business operations, the Respondent annually sells and ships goods or provides services valued in excess of \$50,000 directly to customers or business enterprises who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. It is admitted, and I find, that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issues in this proceeding are whether the Respondent violated Section 8(a)(1) of the Act by various verbal threats, statements, and instances of interrogation, and whether the Respondent violated Section 8(a)(1) and (3) of the Act by discharging three employees because of their activities on behalf of the Union.

B. The Facts

1. Background; 8(a)(1) violations

The Respondent's business consists of picking up milk from dairies and delivering it to various creameries and other milk processors. The Respondent's operations are ongoing 24 hours a day, 7 days a week. The Respondent's approximately 40 truckdrivers customarily work a 6-day schedule, with 2 days off. Thus, their days off change with each rotation of this schedule. They are required to have a weigher's and sampler's license issued by the State.

Charles Morrison began working for the Respondent as a truckdriver on March 22, 1990. His duties were similar to the duties of all other truckdrivers, namely, to weigh, sample, and load milk in the Respondent's tank trucks and transport it from various dairies to creameries or other milk product processors.

After first discussing the possibility of union representation with several employees, Morrison contacted the Union in March 1993.¹ He then spoke to a few drivers about the Union, and passed out some union-related literature which had been furnished him by the union representatives. He also posted a pamphlet on the company bulletin board in the drivers' room at the Modesto facility.

In early April the Respondent held a drivers' meeting at a local Modesto restaurant for the purpose of discussing a new health care package. According to Morrison, about 12 drivers were in attendance. Gene Rubey, the Respondent's vice president, talked generally about the difficult business climate. Ray Avila, Respondent's northern regional manager, then spoke up and indicated that the employees should not look for any help from the unions because unions were undergoing hard times also. He went on to say that other union milk haulers had just shut down and sold their milk-hauling operations, and named Cal Co-Op and CMP as examples. He said that it wouldn't be long before Kings County, another milk hauler, would be the only union milk hauler left in the State.

Avila, testifying regarding this meeting, did admit that he stated that times were difficult and that milk-hauling companies that were involved with unions seemed to be going out of business.

On about April 27, at the Modesto facility, Allen Perryman, the Respondent's chief dispatcher, said that he wanted to talk to Morrison about something. Perryman, according to Morrison, asked, "What's all this Union shit I'm hearing about?" He went on to say that he was hearing all kinds of rumors about a union and they were all pointing right back to Morrison. Morrison was somewhat noncommittal.

¹ All dates or time periods hereinafter are within 1993 unless otherwise specified.

tal and said that he had been a union electrician and was known to be a pro-labor person, and that it should not surprise Perryman that employees would believe that he was involved. Morrison also said that he was not sure he should or could talk to Perryman about the matter.

During the conversation Morrison said that the drivers had not had a raise in 2-1/2 years and that benefits had been reduced, and indicated that under the circumstances such union activity should not have been unexpected. Perryman said that he really didn't care whether the drivers went Union or not because he would have his job anyway. He said that, "If this company goes Union that the color of the trucks is going to change." He also said that a major customer, Hilmar Cheese, would not allow the Respondent to deliver there any longer because Hilmar didn't want union drivers on its property. Morrison replied that he did not believe it was legal for Hilmar Cheese to deny access to the drivers just because they were Union.

Perryman asked Morrison who else was involved in the Union, and said, "Don't rely on your buddy Ted [Duran] there because he's not going to be any help to you." Perryman reiterated that he had talked to other drivers and they had indicated that Morrison was the one behind the union movement. He also asked Morrison where the union meetings were taking place. Morrison said that he needed to talk to some people before he could answer such questions.

Perryman also expressed his concern that union activity could result in the sabotage of the trucks. Morrison replied that if there was any sabotage it would not be attributable to him because he would never do anything to jeopardize the safety of anyone. Perryman also stated that there were a number of drivers who were very much anti-union, and that he could not be responsible for their actions. He added that he would hate to see anything violent happen around the yard. Morrison said that if there was any violence it wouldn't be coming from him.

On the next day, Wednesday, April 28, as Morrison was reporting to work, Perryman asked him who he was seeing down at the union hall. Morrison said that he did not want to talk about this any more and Perryman said, "Good."

Perryman testified as follows regarding the aforementioned conversations: In late April he approached Morrison and said that he needed to talk to him. Perryman told Morrison that he had been hearing some rumors from the drivers about a union, and Morrison's name had been mentioned as being involved in it. Morrison said he really wasn't at liberty to discuss the matter. Perryman said that he really didn't care either way, but he had a terminal to run and was concerned about the safety of the men—he didn't want any violence or disruption of the operations. In this regard, Perryman testified that there had been some windows busted a few days earlier; he did not provide any details of this during the course of his testimony, but apparently attributed the broken windows to the advent of the Union. Perryman denied the remainder of the conversation related above by Morrison. Further, he denied that there was a subsequent conversation on the next day regarding the Union.

2. The discharge of Frank Hayes; 8(a)(1) violations

Employee Frank Hayes began working for the Respondent in 1979. Hayes was a driver based at the Respondent's Los Banos facility, located some 40 miles from Modesto. In

April, Hayes happened to phone Morrison to schedule a fishing trip. The subject of the Union came up and, according to Hayes, Morrison was reluctant to discuss the Union with him, and expressed his fear of being terminated. He also said that he was afraid anything he said to Hayes would get back to Ray Avila. Hayes said that he would not say anything to Avila because, Hayes "wasn't getting along with Ray [Avila]" at that time. Then Morrison said that he had been in touch with the Teamsters. After some further discussion, Hayes said that he would talk to the drivers in Los Banos and see how they felt about the Union if Morrison wanted him to. During the next several weeks, Hayes did discuss the Union with the Los Banos drivers.

Morrison phoned Hayes on April 28 and said he wanted to talk to Hayes in person. Again Morrison said that he was afraid he would probably be fired because of the union activity. Hayes indicated that he had been expecting a call from Morrison, as he had been told by another employee that morning that Morrison had been confronted by Perryman in the Modesto yard and wanted to talk to Hayes. They agreed to meet the following morning.

Prior to reporting to work that afternoon, Hayes phoned his supervisor, Raymond Avila, Respondent's northern regional manager, about a work-related matter. Avila said that he wanted to talk to Hayes about something and would meet him at the yard where the trucks were parked, about a mile from the main Los Banos facility where the trucks were serviced. Hayes drove into the yard and began to put his things in the transport truck in preparation to begin his route. Avila told him to put the items back, that he wasn't going out on his run. He handed Hayes an envelope with insurance papers and said that was all Hayes would be getting. Hayes asked what was going on, and Avila replied, "I should ask you what's up with you and those two guys from Modesto." Hayes asked what two guys, and Avila replied, "The two that you're going to meet in the morning." Avila apparently implied that he knew of Hayes' earlier phone conversation, described above. Avila, according to Hayes, proceeded to ask him what his involvement was with the Union. Hayes told him that he didn't have any involvement and had not met with anyone or signed anything. Avila accused him of lying and said that Hayes would not be going out until further notice. Avila reiterated his belief that Hayes was supposed to be getting with his other two buddies in Modesto the following morning and "meet with them on this issue of this union shit."

Avila said that the only reason he had kept Hayes around was as a favor to Hayes' parents, and that he should have fired Hayes a long time ago. He said that he knew that Hayes had been "slapped around by other drivers," and he (Avila) was holding people back from hitting Hayes. Hayes said that he had not been slapped around by anyone and did not know where Avila had heard this. At some point in the conversation, Avila said that Hayes would have a hard time finding other work because he "was going to be marked as a troublemaker." Also at some point Avila wanted Hayes, and apparently his "two buddies," to report to Modesto the following morning to explain "this union shit" he and his buddies were involved in.

Hayes testified that during his discussion with Avila, another driver, Dave Erreca, drove in to the yard and proceeded to climb in the tank truck to take Hayes' route. Erreca did

not speak to either Avila or Hayes. Hayes looked at Avila and said, "In other words, I'm not going out." Avila said, "No, you're not." Hayes got into his pickup and drove through the yard to the end of the driveway. He then got out of his pickup, walked back to Avila's car, and asked if he was fired. At this point, Avila said, "Yes, you're fired."

The following afternoon Avila phoned Hayes. He asked if Hayes wanted to come down and make a statement to Gene Rube, the Respondent's vice president. Hayes, believing that Avila was asking him to give information about the Union to Rube, said there was nothing to talk about. Avila asked him if he was sure there was nothing he wanted to state, and Hayes repeated that there was nothing to talk about.

Avila, who has been friendly with Hayes' family for 40 years, testified that Hayes received approximately a 2-week suspension in about August 1991, and was transferred to the night shift in September 1991. According to Avila, Hayes was transferred because he could not get along with people. It was becoming such a problem that Avila felt that if he "didn't take him away from the rest of the people, somebody was going to kill him." Hayes apparently protested the transfer and told Avila that he got along with everybody and was not having any problems. Hayes essentially corroborated Avila's testimony in this regard, testifying that in September 1991, he was told by Avila that he would have to accept the transfer to the night shift or go down the road, because Avila was afraid that employees were going to kill him.

Avila testified that he happened to answer the phone at the Los Banos office of the Respondent when Hayes called. Avila told Hayes that he had been looking for him because he had something to give him. Hayes, according to Avila, said, "Oh, you do huh." Avila, who testified that he was used to Hayes' smart-alecky tone of voice, said yes, and that he would meet him at the yard about a mile away where the trucks were parked. Avila discerned from Hayes' brief and sarcastic retort that Hayes "was wise, you know, just these tantrums he throws . . . [h]e was acting awfully funny." On his way out the door, Avila happened to see Dave Erreca, another driver. Erreca had just returned from his route and was fueling his truck for Hayes, who was scheduled to drive the next shift. Avila told Erreca that he had better hang around because Hayes was having another one of his tantrums. According to Avila, Hayes was acting very strange, and Avila didn't know whether Hayes intended to work that evening or what he was going to do.

Avila arrived at the yard prior to Hayes and was standing by his car when Hayes drove into the yard. According to Avila, Hayes' face was redder than a beet when he jumped out of his pickup and said, "Now what the fuck do you want." Avila said that he had an envelope for him which contained health insurance information for the new health insurance coverage obtained by the Respondent. At this point, Hayes started screaming about the Union. He said, "Hey, I know you think I'm involved in the Union. I never signed no fucking card. I haven't been to no breakfast meetings and I haven't talked to nobody. And you think it's me." Avila said that he just came over to give him the insurance envelope, and he didn't care about the Union. At this point Avila was not intending to take any action against Hayes. Hayes then got in his pickup and, on his way out of the yard, accelerated his vehicle in a manner which caused it to spray gravel all over Avila's car. Then he slammed on his brakes, got

out of the pickup, and screamed at Avila: "What the hell is going on. Am I fired from this fucking job." By this time Avila had had enough of Hayes' insubordinate behavior, and he said yes, that Hayes was fired.

Dave Erreca has been employed as a driver by the Respondent for 2 years. Erreca testified that on April 28, as he was fueling his truck and getting it ready for the next driver, Avila came up to him and said that "we might need you to run route 20 tonight." Erreca did not want to run a second route that day, but said okay. Avila told him to just stick around and someone would let him know what was going on. Then Erreca drove to the other yard where the drivers pick up their trucks.

Erreca testified that at the yard he saw Avila hand Hayes an envelope and assumed it contained insurance papers similar to those which Avila had recently given to Erreca. Then he heard Avila and Hayes begin arguing. Hayes, according to Erreca, threw up his hands and said, "I'm tired of this fucking shit and you guys." Then he got in his pickup and threw a bunch of rocks all over everywhere, slammed on his brakes, backed up, got out of his pickup, and said to Avila, "Well, I guess I'm fired." Avila looked at him and said, "Yep, I guess you are fired."

Hayes denied that he used any profanity or screamed at Avila during the exchange in the yard. Nor did he speed away in his pickup and spray Avila with gravel from the yard.

3. The discharge of Ted Duran; 8(a)(1) violations

Ted Duran was employed by the Respondent as a driver on July 27, 1990, and was discharged on May 5, about a week after Hayes. His immediate supervisor was Chief Dispatcher Allen Perryman. Duran learned about the union organizing effort from Morrison. Thereafter, he spoke to a few drivers about the Union. Duran testified that in late April, at the Modesto terminal, Perryman asked to speak with him in the conference room. Perryman asked, "[W]hat's all this union shit?" Duran said he really didn't know what Perryman was talking about and that he did not want to talk about it. Perryman asked him who was involved, where the meetings were taking place, and whether Duran had attended any meetings. Perryman mentioned that he had previously spoken to Morrison about the matter. Perryman said that if the drivers went Union the Company would shut the doors and have another transport company haul the milk, and that he didn't care as he would have a job in any event. He said that the reason he was asking about the Union was because he was concerned for everyone's safety in the event of possible violence, and that he couldn't control the drivers. He also mentioned that Hilmar Cheese, one of the Respondent's biggest customers, would never accept the Union. At some point there was apparently a question by Duran regarding his future employment, and Perryman told him that his job was in no immediate jeopardy.

During this conversation, which lasted about 20 minutes, Perryman stated that he was supposed to go on vacation but that this had been postponed because the assistant dispatcher, Don Avila, Raymond Avila's son, would not be able to handle what was coming up. Duran said that it sounded as if Perryman was preparing for a battle, and Perryman said, "[N]ot a battle, a fight." Perryman said that if the drivers went Union and got \$13 or \$14 per hour, the union dues

would just cancel out the increase in pay; further, the drivers would never get more than 8 hours' work a day, so the increase in pay wouldn't benefit them. Perryman also told Duran not to relay any messages back and forth between the drivers about the Union.

Duran told Perryman that he was not involved with the Union and didn't know why Perryman was talking to him; that he had not attended any union meetings, and that he didn't know who went to the meetings. Perryman said that he was not trying to get anyone in trouble or go after anyone, and Duran said he did not want to be involved with the Union.

A day or two later, Perryman commented to Duran that he had "a full crew, plus two." Duran had noticed that drivers had recently been hired and asked what Perryman's comment was supposed to mean. Perryman said, "Nothing . . . well, it just means I've got a full crew, plus two." Duran testified that he interpreted this to mean that Perryman was in a position to discharge drivers.

Duran was discharged about a week later. On the morning of May 5, he called Perryman to see if the checks were in. Perryman told him he would be receiving his final paycheck and asked him where the fair samples were for Berkeley Farms.² Duran said that he had picked up the fair samples for another customer, Hilmar Cheese Company, but did not know he was supposed to pick up fair samples for Berkeley Farms. Perryman said that there were notices posted in the drivers' room advising the drivers that they were to pick up fair samples for Berkeley Farms as well as Hilmar Cheese that day. Duran said he simply didn't see the Berkeley Farms' notices. Later that day Duran went to the terminal to pick up his paychecks. Perryman handed him a written termination slip along with his paychecks.

The termination notice, dated May 4, states:

On 5-3-93 Rt 60-(9) Ted failed to pull Fair Samples on Rt-9. Obviously Ted didn't read Instructions for all Drivers. This has happened Three times in the last month. This is what Drivers get paid for. Pulling samples.

Perryman testified that he had issued Duran two prior warnings, dated April 5 and 12, respectively. The April 5 warning states: "Ted didn't pull all his samples for State Dairy Assc. Route A. Going Foster Farms." The April 12 warning, according to Perryman, was missing from Duran's personnel file and could not be found. While Perryman was unable to specifically recollect what was contained in the warning notice, he testified that it also was a warning to Duran for failing to pull samples at various dairies prior to delivering the milk to its destination, and may have also contained a reprimand for pulling samples from the top (or

dome) of the tank truck after the milk was loaded, rather than from the holding tanks at the dairy.³

Regarding the various conversations he had with Duran, Perryman testified that in late April he had a 5-minute conversation with Duran, as follows: After observing that Duran had engaged in a conversation with a few drivers, he asked Duran what was going on. Duran proceeded to tell Perryman that there was a lot of "stuff" and rumors regarding the Union that Perryman should have heard about, and that a bunch of guys were talking about the Union. Perryman said that he didn't care and asked Duran if he was involved in it. Duran said that he was not involved and didn't know much about what was going on. That was the extent of the conversation.

Perryman acknowledged that, several days following the aforementioned conversation, he did happen to mention to Duran that he had "a full crew plus a couple extras." Duran asked what that meant, and Perryman said that it meant "nothing." That, according to Perryman, was the extent of the conversation. Explaining what he meant by this remark, Perryman testified that he had been having considerable difficulty with the scheduling of the drivers' routes due to an inadequate complement of drivers, and that this required assigning drivers to work on their scheduled days off. Finally, however, he was able to find a couple of new hires and was getting them trained so the regular drivers would not have to work so hard. According to Perryman, he mentioned this to other drivers so that they could let him know if they needed additional days off, because Respondent was then in a position to possibly accommodate their requests.

Duran testified that he had never read the April 5 warning for failure to pull all required samples. However, he acknowledged that he, as well as other drivers, had, on occasion, failed to pull such samples. Regarding the alleged April 5 warning, he did recall a conversation with Perryman about the matter: He explained to Perryman that he had recently been transferred to the day shift, and that while he had pulled certain samples that day from the dairy in question, he had not remembered the day-shift procedure for pulling certain extra samples on Mondays; and, according to Duran, Perryman apparently found his explanation to be satisfactory and tossed the warning in the trash. Perryman, during his testimony, acknowledged that Duran had previously been on the night shift and was transferred to the day shift sometime around April 5, and recalled that Duran explained to him that he (Duran) had inadvertently neglected to pull the extra samples as he was not yet in sync with the day-shift procedures; however, Perryman was not asked whether he discarded the warning in the trash following this explanation by Duran.

Duran categorically and repeatedly denied that he was issued a warning or had any conversation with Perryman on or about April 12, regarding either a failure to pull samples at the dairy or the pulling of samples from the top of his

² When picking up milk from dairies, the drivers are required to take certain samples of the milk from the dairies' holding tanks prior to transferring the milk into the tank trucks. The samples, consisting of pint or half-pint bottles, which are subsequently tested for bacteria, sediment, and butterfat content, are kept in a cooler in the trucks and are delivered to various destinations for testing. Fair samples are special additional samples of milk which the drivers are periodically required to collect from dairies who desire to have their milk judged in various county and state fairs. Winning ribbons or awards in county and state fairs for high quality milk is a matter of prestige to the dairies and may translate into economic benefit.

³ This latter practice is particularly egregious and prohibited as it tends to give a false reading which would thereby not accurately reflect the correct butterfat content of the milk, particularly as milk from various dairies is often transported in the same tank truck. As the dairies are compensated according to the butterfat content of the samples, false readings may result in economic loss. Taking false samples in this manner is a serious violation of state regulations as well as the Respondent's work rules and warrants dismissal or stringent discipline.

tank trucks. In this regard, Perryman testified that he did investigate the matter and learned from two sources, namely, employee George Bowles and from a receiver at Foster Farms, whom Perryman was unable to identify by name, that both individuals had indeed seen Duran pull samples from the top of the tank truck. While a statement to this effect, apparently prepared by Perryman and signed by George Bowles, was introduced into evidence, Bowles, who testified in this proceeding on behalf of the Respondent about other unrelated matters, was not asked about this incident during his testimony. Perryman testified that he asked the receiver from Foster Farms to put something in writing regarding this alleged infraction by Duran, but the individual refused and said that he did not want to become involved.

4. The discharge of Morrison

The monthly work schedule for the drivers is posted on the bulletin board in the drivers' room. According to this schedule, and in accordance with the regular rotation, Morrison was not scheduled to work on Friday, May 14, or Saturday, May 15. On or about May 10, Morrison noticed that Perryman had changed the schedule and had assigned Morrison to work a shift on Saturday, May 14. Morrison testified that in the event a driver is needed to work a scheduled day off, the usual procedure is that Perryman will first ask one of the drivers whether he is willing to work the particular shift; in the event the driver is unwilling to do so, Perryman will customarily attempt to find another driver to work the shift. However, Perryman did not first check with Morrison on this particular occasion. Morrison testified that the month of May "was a particularly difficult time because we were short drivers."⁴

On seeing his name written in on the schedule, Morrison went to talk with Perryman about the matter. Morrison told Perryman that he had made prior plans for those particular days and explained that the plans involved his wife and his wife's family. He repeatedly attempted to convince Perryman that he needed that Friday off, and Perryman repeatedly denied his requests, stating that Morrison had hours available⁵ and that he would have to work on that Friday. Finally, unable to persuade Perryman to let him have that day off, as previously scheduled, Morrison indicated that he would not work that Friday as "he could not be in two places at the same time." Morrison continued the conversation on the next day, May 13, and suggested that there were several other options available to Perryman which involved juggling the schedules of other drivers who had previously been scheduled to work on the Friday in question. Morrison testified that Perryman became "a little upset" with him, and asked if he was trying to do Perryman's job for him. However, at some point in the conversation Perryman indicated that he would see what he could do, but he couldn't promise anything. Later, Perryman again said that Morrison would be covering the shift, as he had checked and determined that no other drivers were available. Morrison said, "Bullshit . . . I am entitled to my weekends because they're so few and far

between," and he again said that he would not be there to work the shift.

Approximately an hour later, Morrison phoned Perryman's assistant dispatcher, Don Avila, and said that he would not be at work on May 14, because of a medical problem. Shortly thereafter, he went to his doctor because of a flareup of ulcerative colitis, which is aggravated by stress. Morrison testified that the condition "was flaring up pretty bad because I'd been upset a lot lately with the way things had been going." The doctor gave Morrison a note excusing him from work from May 13 through 16 and permitting him to return to work on Monday, May 17.

Morrison returned to work on May 17 and handed the doctor's note to the Respondent. On May 19, Perryman handed Morrison an "Employee Corrective Interview" form, which states, in pertinent part, as follows:

Chuck was scheduled to work on Fri. 5-14-93 at 3:15 p.m. Chuck refused to work and tried to dispatch other drivers so he could have the day off. Under D.O.T. and ICC laws that we are fully aware of the guidelines, and take that responsibility to follow and abide by, Chuck was well under his maximum hours allowed by the laws: which gives us the right to dispatch as we see fit. Our one month schedule is a rough draft of what days off are possible if things go right. . . . Further incidents of the above nature may result in disciplinary action such as suspension and or termination.

Morrison's next scheduled days off were Saturday, May 22, and Sunday, May 23. On about May 19, Perryman again changed the schedule and Morrison was "written in" to work on May 22, beginning at about 4:30 p.m. On the morning of May 22, Morrison again called in sick; Perryman said that he was expecting this, that Morrison should bring a doctor's note, and that he was scheduling Morrison to work on Sunday, May 23. Morrison said that he would not be able to see his regular doctor over the weekend and it would cost too much for Morrison to go to a hospital emergency room. Perryman said that was Morrison's problem. Perryman then said that he was scheduling Morrison to work a shift on Sunday, May 23. At this point Morrison said that there was static on the line and he was having trouble hearing Perryman. Perryman said that he knew Morrison could hear him, and Morrison said that he could not.

Morrison testified that there was no static on the line, and felt that he had no choice but to lie to Perryman about the static as he felt he deserved the time off. He next reported to work on Monday, May 24. He was not allowed to work that day as he did not have a doctor's note. He did get a doctor's note the next day, May 25, and reported to work. Again he was not permitted to work and was given a 5-day suspension together with the following employee corrective interview notice:

You called in, allegedly "sick." I asked you to produce a doctor's certificate as we have done consistently in the past. You refused to provide a medical release, claiming it was too difficult. During that same telephone conversation, I also told you that you were needed to work on Sunday, May 23, 1993. You replied, "I must not have heard you correctly. There's static on the line. I responded, "Yes—you will need to work on

⁴Two drivers had been discharged previously: Hayes on April 28 and Duran on May 5.

⁵Apparently, drivers are permitted to work no more than a prescribed number of hours per week.

Sunday.” During the call, on several subsequent occasions, you repeated, “I can’t hear you right” there must be static on the line, and words to that effect. Significantly, however, later during that same telephone conversation, I again mentioned that you needed to bring a doctor’s note in for Saturday’s absence. You replied, “Allen, you know I can’t easily get to a doctor on Saturday.” After that however, you returned to game playing and repeated, there must be static, I can’t hear you, I don’t know what you are saying.

This insubordination, and your refusal to report for work, cannot and will not be tolerated in the future. After you serve your suspension you are welcome to return to work under the same conditions as every other employee. The decision is yours. We cannot, however, tolerate future violations of company rules, including dishonesty, disobedience and/or insubordination, failure to follow orders and instructions, failure to call in or report for duty, reporting to work late without notifying the supervisor in advance, harassment, or failure to obey applicable company, state or federal regulations.

Morrison testified that he told Perryman that he knew this was a “railroad job” because of his union activity, and that the suspension was taking food out of his children’s mouths. Perryman didn’t reply, but kind of “shrugged it off.”

Thereafter, Morrison had no further scheduling problems or other work-related problems, and he testified that “the whole month [of June] went pretty smoothly.”

Perryman testified that prior to Morrison’s suspension he spoke to Gene Rubey about the matter and recommended that Morrison be discharged for lying and taunting Perryman on the phone. According to Perryman, the month of May was a rough month for scheduling drivers, and Morrison was “pretty much” the only driver who had not worked extra days. Rubey said that Morrison should be given another chance and “a clean slate,” and “That with this situation going on with the Union, that maybe we should just give him a break and see if we can straighten it up.”

On June 30, Morrison was assigned to drive a truck usually driven by another driver, George Bowles. Morrison had driven this vehicle on several prior occasions, and had removed a large box, containing Bowles’ belongings and work-related tools and materials, in order to make room for similar items which Morrison carried with him. During these occasions, Bowles’ box was temporarily stored in the Respondent’s facility. On the date in question, Morrison encountered Bowles as Morrison was carrying his belongings to Bowles’ truck. Bowles told Morrison to “leave that fucking box in that truck or I’m going to kick your fucking ass.” Morrison replied in kind, and said that if Bowles didn’t want his “shit messed with” he should take it home like everybody else does. Bowles, a large man, then grabbed Morrison’s shirt with his left hand and hit him in the face with his right hand. Morrison was thrown backwards by the punch, his glasses were knocked off, and everything he was carrying was scattered on the ground. Morrison was spitting blood, and the entire front of his shirt was ripped off.

Morrison backed away from Bowles and was determined not to get into a fight with him as he believed this was a contrived scenario to cause his discharge as a result of his union activity. He hollered for Perryman to come out of the

office and began kicking a cardboard packing barrel around the yard to vent his frustrations. Perryman came out and asked what happened. Morrison said that Bowles had just hit him, and Morrison wanted him arrested. Perryman said that no one was going to be arrested, and Morrison said that he had been assaulted and it was his right to have Bowles arrested. There was some discussion about what had happened, and during this discussion Perryman said that Bowles’ box was assigned to the truck and that Bowles had been given permission to keep the box in his truck, thus indicating that Morrison had no right to remove it. Morrison said, “Bullshit,” adding that nobody else had that privilege.

Perryman separated the two drivers and said that he had to make a phone call. Shortly thereafter Perryman came out of the office and said that he would call the sheriff if Morrison still wanted him to do that. Morrison, who had time to calm down, said that he had changed his mind and was not interested in having Bowles arrested. Bowles, who was standing nearby, was toeing around among Morrison’s tools and belongings which were still on the ground, and said that the real reason Morrison didn’t want to call the sheriff was because of his possession of a knife which had fallen out of Morrison’s tool caddy. The knife was a type of hunting knife, with about a 5-inch blade, encased in a leather sheath. Bowles said that he would have Morrison arrested for carrying a concealed weapon. Morrison began picking up the things that were scattered on the ground: screwdrivers, a flashlight, a clipboard, sample, bottles, and other items. Morrison said that he wasn’t carrying a concealed weapon because the knife was being carried in an open tool caddy, and “besides that, I have a right to defend myself. I should have come up with it and cut your fucking throat for you.” Perryman said that Morrison would not be cutting anyone in his terminal, and added, according to Morrison, “I’ll take that thing away from you and shove it right up your ass.” Morrison then said, “[T]ry it and I’ll cut your ass, too.” Perryman said, “[Y]ou ain’t shit. You ain’t going to cut nobody.” He said it was against company rules to have that knife and he didn’t want to see Morrison with a knife in the terminal again. During the exchange, Morrison had picked up his knife, and had placed it back in the tool caddy. He did not make any gestures with the knife toward anyone, and the blade was never exposed as the knife was never removed from its sheath. Morrison said that he did not want Bowles to go to jail, and if any proceedings took place they would be civil proceedings. He was not in shape to work his shift that day and went home.

Later that day Morrison received a phone call from Bowles who apologized profusely for what had happened, and explained at length about personal problems that were upsetting him to the point that he was concerned about not being in control of his behavior. He said that he would make a public apology and would pay Morrison for the day’s wages he had lost. Morrison said that he would call Perryman and advise him that Bowles had apologized, and that Morrison didn’t want to have Bowles get fired as a result of the incident. When Morrison called Perryman, he was told that the matter was out of Perryman’s hands and was in the hands of the lawyers; and that he was being suspended pending an investigation of the incident. On a subsequent occasion, Perryman said that the reason the matter had not yet been resolved was not because of Bowles’ assault on him,

but because of the incident with the knife. Morrison said that this was a "bunch of bullshit . . . you're railroading me here . . . because of my union activity."

On July 7, Morrison and Bowles separately met with Gene Rube and Ray Avila. Rube took extensive notes during the meeting, writing out a lengthy statement as Morrison related the details of the June 30 incident. At the end of the session, Morrison said that he and the Respondent apparently had a difference in philosophy regarding the Union and remarked that if he would have known what was going to happen, it was doubtful whether he would have engaged in such activity. Rube and Avila met privately for about 5 minutes, and thereafter returned with a final paycheck and a letter of termination. The termination letter, dated July 7, is as follows:

We have completed our investigation of the recent incident in which, after an altercation, you threatened supervisor Allen Perryman (and fellow employee George Bowles) with a lethal weapon. Mr. Bowles will be dealt with separately.⁶ Regrettably, based solely upon your misconduct, it is our decision to terminate your employment, effective 07/07/93.

Recently, you were suspended for 7 working days for violating Cal-Western policies and regulations. Your prior insubordination, taunting your supervisor and refusal to work required assignments, was unprecedented. Erring in favor of caution, however, we chose only to suspend (not terminate) you, and offer you a "clean slate." You probably should have been discharged for your previous misconduct, but we instead chose to assure you of continued employment as long as you worked satisfactorily, under the same standards we apply to *all* Cal-Western employees.

On June 30, 1993, you were involved in an altercation with Mr. Bowles. Again, his role in that incident will be handled separately. After reviewing the incident and hearing your side of the story, however, we conclude that threatening to knife your supervisor (Mr. Perryman), in the presence of other employees, is entirely unjustifiable. Mr. Perryman sought only to break up the disturbance between you and Mr. Bowles. Your assault of Mr. Perryman was unjustified, and far more outrageous than any similar misconduct ever engaged in by a Cal-Western employee! Your additional threats against Mr. Bowles (to "cut" him with a deadly weapon) and your violation of numerous company rules and policies, i.e., recklessness, disobedience, insubordination and threatening language toward a supervisor, and possessing a dangerous weapon on company property, merely supports Cal-Western's conclusions.

Danny Garcia is a mechanic for the Respondent. Garcia testified that he heard the commotion in the yard on June 30 and summoned Perryman when he realized that the matter had gotten out of hand. Bowles mentioned the knife that was in Morrison's tool caddy, and Morrison had picked it up. Morrison said to Bowles, "I should slit your fucking

throat." Perryman said that Morrison wasn't going to stick anybody in his yard, and that if he didn't put the knife away he was going to take it away from him and stick it up his "ass." Morrison said, "Well, you think you can take it away from me . . . maybe I'll stick you with it." During this episode Morrison was holding the knife in his hand, but did not remove the knife from its sheath. Then Morrison put the knife back into the tool caddy and began picking up the rest of the items which had been knocked to the ground. Morrison kicked both a cardboard container and a metal container, which Garcia later picked up.

C. Analysis and Conclusions

An employer violates Section 8(a)(1) of the Act when it coercively interrogates employees concerning their union activities or the union activities of other employees, makes promises of, or grants, benefits, or threatens employees with economic hardship because they have engaged in protected activities. *Marion Rohr Corp.*, 261 NLRB 971 (1982); *General Electric Co.*, 215 NLRB 520 (1974); *Patsey Bee, Inc.*, 249 NLRB 976 (1980); *Anderson Cottonwood Concrete Products*, 246 NLRB 1090 (1979).

I credit Morrison's account of the early April drivers' meeting during which Respondent's official pointed out to a group of drivers that the economic climate of the milk-hauling business was generally weak, and that union milk haulers were going out of business, ostensibly because of an inability to compete in the market rather than simply because they were Union. Contrary to the position of the General Counsel, I do not conclude that these remarks, made in the context of a meeting called for the purpose of discussing a new health care package, constituted an implied threat that employees would lose their jobs if they continued with the union organizing campaign.

I credit Morrison's account of the April 27 and 28 conversations initiated by Perryman. During the conversations, Perryman interrogated him about his union activity and the union activity of other employees, specifically mentioning that Morrison should expect no help from Ted Duran; asked who Morrison was seeing at the union hall and where the union meetings were being held; implied that if the drivers went Union their jobs would be in jeopardy and the Respondent would "change the color of the trucks," thereby indicating that the Respondent would close its current operations and resume operations with a new complement of employees; and suggested that Morrison should watch out for any antiunion employees who could become violent, and for whom Perryman could not be responsible. By such instances of threats and interrogation, the Respondent has violated Section 8(a)(1) of the Act, as alleged.

I credit the testimony of Duran, and find that in late April Perryman had a similar conversation with him regarding the Union and his union activity. During this conversation Perryman asked Duran who was involved with the Union, where the meetings were taking place, and whether Duran had attended any meetings; warned Duran that he should not relay any messages or information regarding the Union to other drivers; stated that if the drivers went Union the Respondent would shut its doors and have another transport company haul the milk; said that he couldn't control the drivers in the event of possible violence; and warned Duran that in the event the drivers went Union their income would

⁶Bowles was given a suspension of 14 working days. The suspension letter states, in part, "But for your extremely good working history and lengthy tenure with our company this would have been a terminable incident. Physical abuse directed to any employee as was done in this case is unjustifiable and not to be condoned."

not increase as their hours would be reduced to no more than 8 hours per day. By such interrogation and threats the Respondent has violated Section 8(a)(1) of the Act.

I credit the testimony of Hayes and find that in late April, Respondent's northern regional manager, Raymond Avila, interrogated him about his union activity and accused him of lying about his involvement with the Union; implied that he was aware that Hayes would be attending a meeting regarding the Union; and said that Hayes would have a difficult time finding other work as he would be marked as a troublemaker. By such interrogation and threats the Respondent has violated Section 8(a)(1) of the Act.

Hayes was discharged on April 28, immediately after being interrogated regarding his union activity and being marked as a troublemaker by Raymond Avila. I credit Hayes' account of the events on that date and his version of the conversations with Avila. I find that Hayes did not say anything to provoke Avila, intentionally cause rocks or gravel to be showered on Avila or his vehicle, or behave in an insubordinate manner toward him. In this regard I do not credit the testimony of Dave Erreca, a current employee, to the extent that it is inconsistent with Hayes' testimony.

While the record does indicate that Hayes may have had difficulty in getting along with some of the other drivers, thus precipitating his transfer to the night shift in September 1991, over a year and a half prior to his discharge, there is no record of warnings or other evidence of conduct of this nature subsequent to that date. Further, Avila said that he was accustomed to Hayes' alleged outbursts and impudent behavior and indicated that Hayes' alleged sarcastic retort on April 28 was not out of character; and there is no evidence that Hayes had previously refused to drive a scheduled route or was undependable. Accordingly, Avila had no valid reason to believe that Hayes did not intend to drive his route that afternoon. Thus, by directing Dave Erreca to stand by to drive Hayes' route, it is clear that Avila had decided to replace Hayes even prior to Avila's conversation with Hayes at the yard.

During the same brief conversation Avila interrogated Hayes about his union activity, referred to him as a troublemaker, and told him that he would not be driving that afternoon and immediately thereafter he summarily discharged him. The General Counsel has presented a strong prima facie case in support of the unlawful termination of Hayes. The Respondent has failed to meet its⁷ burden of establishing that it would have terminated Hayes independent of any protected activity in which he was involved. Having previously discredited Avila's account of the incident and his purported reasons for discharging Hayes, I find that the credible record evidence abundantly supports the complaint allegation that Hayes was discharged in violation of Section 8(a)(3) of the Act because of his actual or suspected union activity.

It is clear that Chief Dispatcher Perryman was aware of Duran's union activity. He had interrogated Duran and Morrison regarding their own union activity and the union activity of other employees just a week or so prior to Duran's discharge; and Perryman referred to Duran at the time he interrogated Morrison, stating that Morrison should not "rely on

your buddy Ted [Duran] because he's not going to be any help to you." This latter statement, coupled with Perryman's remark to Duran several days later that Perryman had "a full crew, plus two," under the circumstances, indicates that Duran's continued employment with the Respondent was tenuous at best. While Perryman testified that he simply meant the remark to mean that he had hired additional drivers and that this would benefit all the drivers who were then being overworked, his evasiveness in answering Duran's direct question as to its meaning is indicative of a more sinister motive: that Duran was readily replaceable. I find that this remark by Perryman constitutes an implied threat of discharge and is violative of Section 8(a)(1) of the Act, as alleged.

Duran's failure to pull the Berkeley Farm fair samples on May 3 is admitted. This omission did not result in any economic harm to either the Respondent or Berkeley Farms, as the samples were timely submitted to the appropriate location. According to Perryman, this was the final straw, as during the previous month Duran had repeatedly demonstrated an inattentiveness to work that could no longer be tolerated.

I credit the testimony of Duran and find that the April 5 warning for failure to pull extra samples had in fact been discarded in the trash after Duran gave Perryman a satisfactory explanation for his failure to obtain these samples. Thus, it was Perryman's intent that this warning would not remain in Duran's personnel file. Further, contrary to the assertions of Perryman, I credit Duran's testimony that he had never received any reprimand or warning on or about April 12. Duran repeatedly denied that he had ever seen or received such a warning, either verbal or written, and the Respondent has produced no such warning, maintaining that it has been lost.

Thus, I find that the only infraction for which Duran should have been held accountable was his failure to pull the fair samples on May 3. Clearly, this isolated instance of inattention to work is not serious enough to warrant Duran's discharge. Indeed, there is documentary record evidence that drivers often neglect to pull samples; customarily, they are simply reminded to do so and are not given a written warning. Moreover, the record demonstrates that the Respondent's practice is to suspend employees for various periods of time depending on the severity of the infraction: Morrison was given a 5-day suspension for gross insubordination, and Bowles was given a 14 working-day suspension for physical violence against another employee, *supra*. Even assuming *arguendo* that Duran had been given three written warnings within about a 1-month period, the Respondent proffered no explanation for its decision to discharge Duran rather than suspend him for an appropriate period of time in accordance with its established practice.

The General Counsel has presented a strong prima facie case in support of the unlawful discharge of Duran. The Respondent has failed to meet its *Wright Line* burden of demonstrating that Duran would have been discharged even in the absence of the protected activity in which he was engaged. Accordingly, I conclude that by discharging Duran on May 5, the Respondent has violated Section 8(a)(3) of the Act, as alleged.

The complaint alleges that the changing of the scheduled days off of Charles Morrison and the subsequent warnings and 5-day suspension for failing and refusing to work those

⁷ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *affd.* in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

days were unlawfully motivated. There is abundant record evidence, including documentary evidence, that during the month of May many drivers, in addition to Morrison, were scheduled to work on their days off and that this was a usual and customary occurrence. When Morrison protested this change of schedule, Perryman said that he would attempt to find someone else to drive the route; however, he was unable to do so. Nor did the General Counsel introduce any evidence to show that the Respondent could or should have made other arrangements to accommodate Morrison. I find that by requiring Morrison to work on his scheduled days off the Respondent was not motivated by unlawful considerations; rather, it treated Morrison in the same manner as all the other drivers.

Further, I find that the warnings and 5-day suspension of Morrison constituted an appropriate response to Morrison's clear acts of insubordination: Morrison had advised Perryman that he did not intend to work on the days in question and did not do so; and thereafter pretended that there was static on the line whenever Perryman mentioned that he wanted Morrison to work on a subsequent day. Under the circumstances, the 5-day suspension of Morrison was not unwarranted.

The June 30 knife incident, precipitated by Bowles, created a very unfortunate chain of events. After being assaulted, and in an understandably highly emotional state, Morrison spontaneously said that he ought to cut Bowles' throat, and then, when Perryman attempted to intervene, Morrison made a similar threat toward him. While the knife was not removed from its sheath and was not brandished by Morrison, the threat to cut someone, even in the absence of a weapon, is nevertheless a serious matter. To be sure, Perryman could have chosen less provocative language to diffuse the situation, but I do not think that Perryman's statement that he would stick the knife up Morrison's "ass" if he attempted to use it on Bowles excused Morrison's threat toward Perryman; Morrison was the first to threaten the use of the knife. The incident was serious and the Respondent treated it as such.

I am well aware that Morrison was instrumental in contacting the Union, and it is reasonable to presume that the Respondent, during the course of interrogating employees, may have learned or at least suspected this. There is no doubt that the Respondent was aware of Morrison's strong support of the Union, and, as found above, the Respondent had previously exhibited its response to such a unionization attempt by discharging two other employees. Similarly, the Respondent would have welcomed any excuse to discharge Morrison. Thus, the General Counsel has presented a prima facie case supporting the allegation that Morrison's discharge was unlawfully motivated.

I conclude, however, that the Respondent has sustained its burden of proof under *Wright Line*, supra, by demonstrating that under the circumstances here, and particularly in light of his prior recent instances of insubordination, warnings, and suspension, Morrison would have been discharged even in the absence of his union activity. Accordingly, I find that Morrison's discharge was not violative of the Act, and I shall dismiss this allegation of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by the various instances of coercive interrogation and threats of discharge, plant closing, loss of wages, and other similar conduct found here.

4. The Respondent has violated Section 8(a)(3) and (1) of the Act by discharging employees Frank Hayes and Ted Duran because of their interest in and activities on behalf of the Union.

5. The Respondent has not engaged in other violations of the Act as alleged in the complaint.

6. The unfair practices set forth in paragraphs 3 and 4 above constitute unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act. Moreover, the Respondent shall be required to post an appropriate notice, attached hereto as appendix.

Having found that the Respondent unlawfully discharged employees Frank Hayes and Ted Duran, I recommend that it offer them immediate and full reinstatement to their former positions of employment without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and benefits they may have suffered by reason of the Respondent's discrimination against them. Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 181 (1987).

Further I recommend that the Respondent remove from its files any reference to the unlawful discharges and notify the employees that it has done so and that it will not use the discharges against them in any way.

Based on the foregoing findings of fact and conclusions of law and on the entire record,⁸ I issue the following recommended

ORDER

The Respondent, Cal Western Transport, Inc., Modesto and Los Banos, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their own union activities or the union activities of other employees.

(b) Threatening employees with loss of jobs, wages, the closure of the facility, or future job opportunities because of

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

their union activity, or with the possibility of violence from antiunion employees.

(c) Discharging employees because they have engaged in union activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees Frank Hayes and Ted Duran whole for any loss of pay or benefits suffered by reason of the discrimination against them, in the manner described above in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents, for examination any copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at the Respondent's facilities at Modesto and Los Banos, California, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all parties had the opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and to obey its provisions.

The Act gives employees the following rights.

- To organize themselves
- To form, join, or support unions
- To bargain as a group through representatives of their own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all such activities.

WE WILL NOT interrogate employees regarding their own union activities or the union activities of other employees by asking who is involved with the Union, where union meetings are being held, or any other questions about employees' involvement with the Union.

WE WILL NOT threaten employees with loss of jobs, discharge, reduced income, or the closing down of the business in the event they select the Union as their collective-bargaining representative, and the possibility of violence by antiunion employees.

WE WILL NOT discharge employees because they have engaged in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer employees Frank Hayes and Ted Duran immediate and full reinstatement to their former positions, without loss of seniority or other benefits.

WE WILL make them whole, with interest, for any loss of pay or benefits suffered by reason of our discrimination against them and we will expunge from their personnel files any reference to their discharges.

CAL WESTERN TRANSPORT, INC.